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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 71 - 295

BRUCE GIBBS and TERRY STEPHENS,

Petitioners

versus

BRUCE SEXTON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATION TO OPINIONS BELOW

1.

The opinion of the United States Court of Appeals for the Fifth Circuit in Amarillo, Bruce Gibbs and Terry Stephens, Appellants VS. Bruce Sexton, Appellee, ____Fed 2d ____, printed in appendix A hereto--Pages 11 through 12.

2.

The opinion of the United States District Court from the Northern District of Texas in the case of Bruce Sexton VS. Bruce Gibbs and Terry Stephens, ____F. Supp. ____, printed in the appendix B hereto--Pages 13 through 31.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 1, 1971.

A motion to stay the mandate was filed in the United States Court of Appeals, Fifth Circuit, on the 10th day of June, 1971, for the reason that Appellants intended to file a petition for writ of certiorari in the United States Supreme Court. Mandate was stayed to August 26, 1971 by the clerk of the United States Court of Appeals.

The jurisdiction of this court is invoked under 28 U.S.C.A., Section 1254.

QUESTION PRESENTED

Whether the Circuit Court was correct in holding the facts found by the District Court are supported by substantial evidence when the District Judge failed to recognize that the law of probable cause allows for mistakes made by officers who are faced by an ambiguous situation if the officer has knowledge of facts and circumstances sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

STATUTES AND ORDINANCES INVOLVED

1. TITLE 42, SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. ARTICLE 14.03, TEXAS CODE OF CRIMINAL PROCEDURE

Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.

STATEMENT

Plaintiff, Bruce Sexton, sued defendants, Bruce Gibbs and Terry Stephens, City of Amarillo Police Officers, under the Civil Rights Act, 42 U.S.C.A. 1983, for damages claiming false arrest and unlawful search and seizure of this automobile. Trial was before the Court without a jury.

The evidence in the Trial Court showed that at 11:15 p.m. on May 29, 1969, in the City of Amarillo, the Plaintiff:

1. ran a stop sign at 35th and Georgia,

2. failed to turn upon having the green arrow for a lefthand turn at 34th and Georgia,

3. kept glancing back at the officers in his rear view mirror,

4. turned around and looked at the officers,

5. started into the intersection against a red light,

6. upon being motioned to pull his car over, got out of his car and locked the doors,

7. had glazed and bloodshot eyes,

8. had shakey hands and difficulty in signing the traffic citation.

After continuing their patrol, the officers then sited Plaintiff's vehicle for the second time and heard and observed the following:

1. Plaintiff's vehicle parked on a darkened lot behind a closed Bi-Low Food Store in an area near the rear door,

2. Plaintiff sitting in his automobile with his head bowed, slouched forward and not moving for several minutes,

3. Plaintiff replied to the officer's question as to what he was doing in an angry tone that he was reading his traffic ticket, when he had read the ticket at the time it was issued and there was no light in the darkened lot,

4. a large tool box was sitting upon the floor of the Plaintiff's car,

5. the officers testified that Plaintiff moved real sudden, jumped out of his car and turned on the officer with his hands doubled like he was going to strike them. The Trial Judge refused to believe the testimony of the attempted assault since the assault had not been plead or mentioned in the pretrial procedure,

6. after getting out of the car, Plaintiff again locked the door,

7. Plaintiff's eyes were bloodshot and did not appear normal to the Officer Gibbs. Officer Stephens shined his flash light into Plaintiff's eyes and noticed the pupils were very slow in reacting.

Officer Gibbs shook the Plaintiff down, got his car keys and put Plaintiff in the back of his patrol car. Officer Gibbs and Stephens then searched Plaintiff's car and found in addition to the tool box, numerous automotive accessories in the trunk. The officers tried to radio a supervisor to come out to the scene and assist them with the investigation but none was available at the time so they decided to take Plaintiff to the station, Plaintiff was handcuffed and held in the booking room during investigation until the officer discovered a receipt for the automotive accessories. The trial court held that there was no evidence that Plaintiff was found in a suspicious place and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace or about to commit some offense against the law.

The court entered judgment for the

Plaintiff, directing Plaintiff receive the sum of $500.00 from defendant Gibbs and $250.00 from defendant Stephens.

Defendants filed a motion for a new trial which was denied without hearing on an order which the court said would constitute additional finding of facts and conclusions of law.

The United States Court of Appeals, affirming the decision of the District Court, held that the facts found by the District Court are supported by substantial evidence and legal conclusions reached are supported by the facts found.

ARGUMENT

The Defendants testified that they were acting under Section 14.03 of the Texas Code of Criminal Procedure which provides for an arrest without a warrant of any person:

(1) found in a suspicious place;

(2) under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace. The trial judge stated that there was no evidence or any reason to believe that in this case the person arrested has been guilty of some felony or breach of the peace.

The officers contend that the facts which they observed would lead the ordinary prudent officer to the reasonable conclusion that Plaintiff had been guilty of a narcotics violation as (1) Plaintiff had run a stop sign at 34th Avenue and Georgia Street; (2) he then failed to make a left hand turn at 34th Avenue and

Georgia Street when he had the green arrow to do so; (3) upon realizing the presence of the officers' vehicle behind him, ke kept glancing back at the officers in his rear view mirror and turned around and looked at the officers; (4) he started into the intersection against a red light still realizing the officers were behind him; (5) when pulled over for the traffic violation, he got out of his vehicle, rolled up the windows, locked the doors and returned to the police vehicle; (6) in the police vehicle his eyes were bloodshot and glazed, but there was no smell of alcohol; (7) he had extreme difficulty in signing the traffic ticket and misspelled his first name; (8) when the defendants observed the Plaintiff's vehicle shortly thereafter, it was parked behind a closed grocery store in a poorly lighted parking lot less then a block from the traffic offense and Plaintiff was slumped over the steering wheel; (9) Plaintiff remained motionless and in that position for sometime; (10) when the officers approached Plaintiff's vehicle and asked what he was doing back there, he replied that he was reading his ticket (the light was poor for reading and the Plaintiff had thoroughly read the ticket before signing); (11) when asked to get out of his vehicle, he again locked the car doors; (12) when Defendants flashed a light in his eyes, the eyes were extremely slow in reacting.

The officer also contended that the facts which they observed would lead a reasonable prudent officer to the conclusion that Plaintiff had been guilty of a burglary violation, based on (1) the apprehension which Plaintiff demonstrated toward the police vehicle at the intersection; (2) the attempts by Plaintiff to put his vehicle beyond the reach of the officers by rolling up the windows and

locking the doors on both occasions; (3) the position of Plaintiff's vehicle behind the grocery store in a poorly lighted parking lot at a late evening hour; (4) a tool chest which was easily observed in the back seat of Plaintiff's vehicle. The officers contend that all these facts taken in the totality of the circumstances would lead a reasonable prudent officer in believing that Plaintiff had either committed a burglary or was guilty of a narcotics violation.

On cases dealing with law of probable causes, the court would look for objective facts and inferences which a trained officer may draw from these facts. Brinegar vs. U.S., 69 S.Ct. 1302, 1310-11, 338 U.S. 160, sets the standard:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved. . . . Probable cause exists where the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. . . . Because many situations would confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their

> part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability . . ."

In Bell vs. United States, 254 F (2d) 82, U.S. Ct. App., Dist. of Col. Cir. 1958, Cert. den 79 S.Ct. 126, 358 U.S. 885, 3L. Ed. 2d 113, Reh. den., 79 S. Ct. 292, 358 U.S. 923, 3L. Ed. 242, at p. 87 the Court held that arrest without a warrant would be judged by the standard of what a reasonable prudent officer would do, taking into account all the circumstances of a particular situation.

Defendants contend that the circumstances delineated in the statement of the case reasonably indicates to a trained officer that the party arrested had in all probability been guilty of:

(1) Art. 725b of the Uniform Narcotic Drug Act, Vernon's Texas Penal Code. (unlawful for any person to possess a narcotic drug);

(2) Art. 6701d, §50, Vernon's Texas Civil Statutes (operation of a motor vehicle under the influence of any narcotic drug); or,

(3) that the arrested party had committed a burglary.

The trial judge failed to view the facts preceding the arrest from the viewpoint of the ordinary prudent officer in the field as required by the Brinegar decision; otherwise he would have recognized the ambiguity of the circumstances which faced Gibbs and Stephens. When the trial judge was making his decision, he was aware that Plaintiff had not been charged with an offense and that the

search of the vehicle negated any possibility of a burglary; However the police officers in the field were not so fortunate, they were faced with a situation where they had to make a decision based on the facts which they witnessed and the reasonable inferences that a trained officer may draw from the facts. The Brinegar case sets out a middle area of (ambiguity) wherey an officer's actions will be protected when he acts as a reasonable prudent officer. The protection as required by Brinegar was not afforded to Gibbs and Stevens.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE

It is certified that copy of this petition has been furnished personally Mr. Harris Lofthus of the Fisk Building, Amarillo, Texas, 79101, attorney for Respondents.

Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 30127

D. C. Docket No. CA 2-728

BRUCE SEXTON,
Plaintiff-Appellee,

versus

BRUCE GIBBS and TERRY STEPHENS,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Associate Justice*, and GEWIN and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel:

---

* Associate Justice, United States Supreme Court (Ret.), sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

June 1, 1971

Issued as Mandate:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BRUCE SEXTON, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 2-728
BRUCE GIBBS and TERRY STEPHENS, Defendants	)	Filed May 6, 1970

J U D G M E N T

This action came on for trial before the Court, without intervention of a jury, on the 13th day of April, 1970; and the Court, after duly considering all the evidence submitted and all pleadings filed by the litigants, has this day issued and filed its Findings of Fact and Conclusions of Law which are referred to here for all purposes.

For the reasons set forth in said memorandum opinion it is the opinion of this Court that judgment should be entered in favor of Plaintiff as follows:

It is ORDERED, DECREED and ADJUDGED that Plaintiff, Bruce Sexton, recover of and from the Defendant, Bruce Gibbs, the sum of Five Hundred ($500.00) Dollars, and of and from the Defendant, Terry Stephens, the sum of Two Hundred and Fifty ($250.00) Dollars, both amounts to bear interest at the rate of

six (6%) percent per annum as provided by law. All costs are taxed against the Defendants.

The Clerk will furnish a copy hereof to all attorneys.

Entered this 5th day of May, 1970.

HALBERT O. WOODWARD
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BRUCE SEXTON, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 2-728
BRUCE GIBBS AND TERRY STEPHENS, Defendants	)	Filed May 6, 1970

MEMORANDUM OPINION

On the 13th day of April, 1970, the above entitled and numbered cause came on for trial before the Court. Plaintiff and his attorney were present in open Court as were Defendants and their attorneys.

This is a suit brought under Section 1983 of Title 42, United States Code, which provides for civil action for deprivation of rights and reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Those rights which Plaintiff claims that Defendants deprived him of are the right to be free of unreasonable searches and seizures guaranteed by the Fourth Amendment and the right to be free from unlawful arrest guaranteed by the Fifth Amendment. Both rights are extended protection from state action by the Fourteenth Amendment and Section 1983 of Title 42, United States Code.

Plaintiff seeks monetary damages in the amount of $5,000.00 from each Defendant for deprivation of the aforementioned rights. Section 1983 of Title 42, United States Code, authorizes the award of money damages in appropriate cases brought under this section. Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965).

The conduct of the Defendants and the legal consequences thereof will be analyzed as to the two distinct constitutional claims alleged--unlawful arrest and unreasonable search and seizure.

I. THE ARREST

A. Findings of Fact

Although there is some controversy over the details concerning the arrest, the controlling facts are quite simple and as found herein are as follows:

1. About 11:15 p.m. on Thursday, May 29, 1969, Defendants, who were Amarillo city police officers, stopped Plaintiff for running a stop sign at the intersection of 35th and Georgia Streets in the City of Amarillo. After coming to a stop, Plaintiff rolled up his car windows, got out of his car, locked the car doors and got into the police car where one of the officers issued him a

traffic ticket. Plaintiff appeared to be nervous and agitated but was cooperative and signed the ticket after he appeared to have read it. Defendants did not take Plaintiff into custody at that time.

2. Plaintiff returned to his car and both cars moved away from their positions during the issuance of the ticket. Plaintiff drove his car to a near-by parking lot where he stopped his car and remained in it.

3. Defendants drove away and continued to patrol their assigned area. During their patrol they returned a short time later to the area where the ticket was issued and noticed that Plaintiff's vehicle was still parked on the lot. Plaintiff was sitting inside sort of slouched over and relatively motionless.

4. Defendant Gibbs approached Plaintiff's automobile to see why he was still parked there. As he did so he noticed a large tool box on the rear floorboard. Officer Gibbs asked Plaintiff what he was doing. Plaintiff replied that he was reading the traffic ticket. The light was very poor for reading.

5. Defendant Gibbs asked Plaintiff to get out of his car which Plaintiff abruptly did, again locking the car door after he had gotten out. At this point Gibbs placed Plaintiff under arrest, handcuffed him and put him in the police car.

6. During the trial of this case Defendants, for the first time, asserted that at the time of the arrest and handcuffing of Plaintiff, that Plaintiff had jumped out of his car abruptly and in an angry manner

locked the car door and suddenly turned on Defendant Gibbs with his hand upraised in a threatening manner. He was substantiated to an extent by the testimony of Defendant Stephens, and they gave this as one of the reasons that Plaintiff was handcuffed and arrested.

However, after a careful examination of the pleadings in this case, it is evident that at no time prior to the trial did Defendants assert a defense such as this. The complaint and pretrial order were each very detailed as to the facts that they observed at the time of the incident, and not once did they mention a threatening gesture. It is not explained why the alleged resistance to arrest, threatening gesture, or threat to the safety of Defendants was not brought up prior to the trial. Such resistance or threats or even threatening gestures could not only be a valid cause for an arrest but the basis for a possible criminal complaint against Plaintiff, and such a complaint was not filed.

If this Court could believe in this case that a gesture was made toward Defendants by Plaintiff in such a manner as to threaten harm or injury to Defendants, this Court would declare this as a valid defense to Plaintiff's complaint.

Not only does it appear that this threatening gesture did not occur in the manner that Defendants now recollect, it is very obvious that Defendants did not attach any significance to any such acts on the part of Plaintiff at the time of the arrest. Although it might be that such actions by the Plaintiff could have influenced their decision to arrest him, it is apparent that it did not influence them and that it was not a factor in the decision to arrest Plaintiff. The Court finds

that the threatening conduct testified about at the time of the trial did not occur in the manner described or to a degree that it would become a significant factor at the time of the arrest and of course will not be considered in the legal determinations which follow in this opinion.

Again, it is asserted, that this could be a valid defense because this Court is of the opinion that police officers have a right to be secure in their person and well-being on such occasions, but the prior pleadings in the case do not lead to the belief that any threatening gesture of a significant nature was made by Plaintiff at the time he was arrested and handcuffed.

7. Although the nature of the arrest was never specified and no formal charges were ever filed against Plaintiff, Defendants felt that they were complying with state law and following standard police procedures when they arrested him. There was no intentional or willful abuse of Plaintiff or his Constitutional rights.

8. Plaintiff was not guilty of any felony or breach of the peace and no circumstances existed at that time which would reasonably show that he was about to or had committed some offense against the law, and no probable cause for arrest existed.

B. Conclusions of Law

1. Suits under this Section are a proper method by which to seek redress for violations of an individual's right to be free from unlawful arrest. 42 U.S.C. §1983. Nesmith v. Alford, 318 F.2d 110, reh.denied. 319 F.2d 859 (5th Cir.1963), cert.denied,

375. U.S. 975 (1964).

2. States may enact statutes setting forth specific circumstances in which arrests may be made without a warrant, but an arrest under such statutes is valid only if the arrest is not violative of the Constitution. Klinger v. United States, 409 F.2d 299 (8th Cir.), cert.denied, 396 U.S. 895 (1969). Article 14.03 of the Texas Code of Criminal Procedure is such a statute. This Court assumes, without deciding, that said statute is constitutional as written. Despite the use of the word "suspicious" in this statute, it is the rule in this Circuit that a person may not be arrested on suspicion alone, Nicholson v. United States, 355 F.2d 80 (5th Cir.), cert.denied, 384 U.S. 974 (1966), and that a hunch does not constitute probable cause, Lathers v. United States, 396 F.2d 524 (5th Cir.1968). Article 14.03 of the Texas Code of Criminal Procedure provides for the arrest of a person in suspicious places and under circumstances which reasonably show that the person arrested has been guilty of some felony or breach of the peace, or threaten or is about to commit such an offense. There is no evidence or any reason to believe that in this case such circumstances existed as shown in Findings of Fact 8 above, and therefore the arrest was invalid under Art. 14.03, Texas Code of Criminal Procedure. United States v. Butler, 223 F.Supp. 24,26 (W.D.Tex. 1963).

3. An arrest which is made without a warrant is not violative of the Constitution only if "at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information was

sufficient to warrant prudent men in believing that the [person arrested] had committed or was committing an offense." Beck v. State of Ohio, 379 U.S. 89 (1964); see also Brinegar v. United States, 338 U.S. 160 (1949); Klingler v. United States, 409 F.2d 299 (8th Cir.), cert. denied, 396 U.S. 859 (1969).

4. The Court recognizes the principle asserted by Defendants that there is a presumption of regularity which supports official acts of public officers, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. But this proposition does not necessarily lead to the conclusion that Defendants urge on the Court--that the burden of proof in this case is on the Plaintiff. The Court of Appeals for the Fifth Circuit has held that once the person arrested has shown the arrest to have been without a warrant, the side advocating the lawfulness of the arrest has the burden of persuasion to establish probable cause for the arrest. Manuel v. United States, 355 F.2d 344, 346 (5th Cir.1966). Defendants' asserted presumption of regularity would extend to an arrest with a warrant but not to one without, such as is the case here. The burden of establishing probable cause fell on Defendants. See Barnett v. United States, 384 F.2d 848 (5th Cir.1967); Williams v. United States, 382 F.2d 48 (5th Cir.1967).

5. Considering the totality of circumstances urged by Defendants and as discussed above under Findings of Facts, this Court concludes that the facts as found simply do not allow any other than a negative answer to this critical question: At the moment of arrest, were the facts and circumstances within the knowledge of Defendants and of which they had reasonably trustworthy information sufficient

to warrant prudent men in believing that Plaintiff had committed or was committing an offense? Accordingly, Defendants did not have probable cause to arrest Plaintiff without a warrant and the arrest was in violation of Plaintiff's constitutional rights to be free from unlawful arrest.

II. SEARCH OF PLAINTIFF'S AUTOMOBILE

A. Findings of Fact

There are no material conflicts between Plaintiff and Defendants concerning the search of Plaintiff's car. The relevant facts in this regard are:

1. While Plaintiff was handcuffed in the police car Defendants, who had possession of Plaintiff's car keys, unlocked Plaintiff's car and searched the interior, and then unlocked the trunk and searched it, all without Plaintiff's permission or consent.

2. Defendant Gibbs drove the police car with Plaintiff handcuffed and seated on the front seat to the police station. Defendant Stephens drove Plaintiff's car to the police station, without Plaintiff's permission or consent.

3. Defendants again searched Plaintiff's car at the police station while Plaintiff remained inside the station in handcuffs. This search was also conducted without the Plaintiff's permission or consent. No warrant was obtained for this search.

4. After this search, during which nothing was found to implicate Plaintiff in any crime, Plaintiff was released without any charges having been placed against him in

connection with his arrest and the search and seizure of his person and automobile.

B. Conclusions of Law

1. The Fourth Amendment prohibits only unreasonable searches and seizures. Desist v. United States, 394 U.S. 244 (1969). Suits are authorized under Section 1983 of Title 42, United States Code, to seek redress for violation of a person's right to remain secure from unreasonable search and seizure. Lucero v. Donovan, 354 F.2d 16 (9th Cir.1965).

2. The Fourth Amendment's protection against unreasonable searches and seizures are applicable against state law enforcement officers through the Fourteenth Amendment in the same measure as against federal officers. Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969). Searches without a search warrant are not unreasonable if they are incident to a lawful arrest, United States v. Ventresca, 380 U.S. 102 (1965), or made with reasonable or probable cause, Williams v. United States, 404 F.2d 493 (5th Cir.1968).

a. Incident to Arrest

(1) Unlawful Arrest

This Court has concluded for reasons set forth under Part I, above, that this was not a lawful arrest; that it violated Plaintiff's constitutional right to be free from unlawful arrest. Under such a conclusion, Defendants' contention that the searches were lawful because they were incident to a lawful arrest is untenable. Searches and seizures which are lawful only if incident to a valid arrest are unlawful if the arrest does not meet the test of legality. Bowling v.

United States, 350 F.2d 1002 (D.C.D.C. 1965). These searches and seizures were unlawful and violations of Plaintiff's Fourth Amendment right to remain secure from unreasonable searches and seizures.

(2) Lawful Arrest

Perhaps no general principle is more often stated or relied on in advocating the legality of a warrantless search than the statement previously made--searches and seizures incident to a lawful arrest are likewise lawful. However, there are limitations on the extent to which this principle can be utilized. For example, "[r]ecent decisions by [the Court of Appeals for the Fifth Circuit] confirm that for a warrantless search of an automobile under police control to be lawful it must be closely related to the reason for the arrest the car is in custody." Williams v. United States, 412 F.2d 729, 735 (5th Cir.1969). See also United States v. Ryan, 415 F.2d 847 (5th Cir.1969). The essential nexus is missing here. The police conducted not one but two general and thorough searches of Plaintiff's car while it was under their control, all without giving a plausible reason for the arrest by which the legality of the searches could be evaluated. As the Court of Appeals for the Fifth Circuit has stated in condemning a search under similar circumstances: "The search was not necessary to protect the officers, no emergency existed, nor was there danger that evidence might be lost or the vehicle might be removed." United States v. Adams, ____ F.2d ____(5th Cir. April 7, 1970) Docket No. 27070 at 4. There is no doubt that on the theory of Adams that these warrantless searches were unreasonable.

Another well recognized limitation on this general principle is the rule that a search can be incident to an arrest only if it is substantially contemporaneous with arrest and is confined to the immediate vicinity of arrest. Shipley v. State of California, 89 S.Ct. 2053 (1969). The United States Supreme Court has refined this rule to hold that the search of a motor car not undertaken until the persons who had occupied it had been taken in custody of a police station and the car had been towed away in police custody was too remote in time and place to have been incident to arrest. The Court then held that such a search without a warrant failed to meet the test of reasonableness under the Fourth Amendment. Preston v. United States, 376 U.S. 364 (1964). The Court of Appeals for the Fifth Circuit has followed this rule in a case remarkably similar to this case in which the Court held that even if an arrest by state officers was valid, it came to an end when the person arrested was confined on a nonexistent charge and subsequent search of his vehicle was unlawful. Collins v. United States, 289 F.2d 129 (5th Cir.1961). The same rule was applied in Barnett v. United States, 384 F.2d 848 (5th Cir. 1967).

For these reasons, the searches, particularly that one conducted at the police station were unreasonable, even if they were incident to a valid arrest.

b. Probable Cause

The issue for determination--assuming that this Court is correct in its holding that the searches cannot be upheld as being incident to the arrest as discussed in paragraph a, above--is whether there was probable cause for those searches. The test for

probable cause for a warrantless search of a vehicle in custody of police is substantially the same as the test for probable cause for a warrantless arrest--the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information must have been sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed. Hamer v. United States, 259 F.2d 274 (9th Cir.1958); cert.denied, 359 U.S. 916 (1959).

Since the facts and the legal standards are the same for the searches as for the arrest, the same result must be reached. There was not sufficient probable cause for the searches. Consequently, Defendants by conducting said searches deprived Plaintiff of his right to remain secure from unreasonable searches. See the Court's discussion in part IB5, above.

III. GOOD FAITH OF OFFICERS AS A DEFENSE

By the foregoing discussion this Court has set forth why it has concluded that Defendants' conduct failed to meet the applicable legal standard and therefore violated certain of Plaintiff's federally protected rights. Defendants assert that, even though they may have failed to meet the standard, they are not liable to Plaintiff in this suit because they made a good faith effort to comply with the law as they understood it.

Defendants rely primarily (if not solely) on certain language contained in a recent decision of the Supreme Court of the United States to the effect that:

> " . . . the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983." Pierson v. Ray, 386 U.S. 547, 557 (1967).

It should be noted that important distinctions exist between the Pierson case and this case. There, the police officers were sought to be held liable for having arrested plaintiffs in compliance with a state statute which was later held unconstitutional. Here the officers have failed to reasonably comply with a valid state statute. Further, in Pierson, there was no finding that the arrest had been without probable cause while this Court has expressly held in Parts I and II, above, that Defendants did not have probable cause to arrest or search Plaintiff. It is to be expected that such important and substantial distinctions may cause different results.

The Court of Appeals for the Seventh Circuit in Joseph v. Rowlen, 402 F.2d 367 (7th Cir.1968), was faced with a situation much like that present in this case. In the Joseph case a police officer had arrested the plaintiff without a warrant, relying on a state statute for such action. The plaintiff made out a case that the policeman had not had probable cause to make the warrantless arrest. The District Court directed a verdict for the police officer apparently on the theory that good faith was a defense to these actions. The Court of Appeals thoroughly analyzed the police officer's contention that he had acted in good faith and was therefore not liable. The police officer also cited the Supreme Court decision in Pierson v. Ray, supra, as

dictating that a finding that he acted in good faith precluded liability.

The Joseph Court recognized that the decision issued in Pierson stated as a binding rule of law that:

> "A police officer is not liable if he acted in good faith and with probable cause in making an arrest under a statute he believed to be valid even though the statute be later held invalid." 402 P.2d at 370.

This rule, however, was not considered controlling because the Court concluded its deliberations with the following:

> "In dealing with the questions whether a person is liable under sec. 1983 only if he acted with a specific intent to deprive a person of a federal right, and in deciding that such intent was not required, the Supreme Court said section 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' (Footnote omitted)
>
> "Although the Supreme Court refers in Pierson to 'the defense of good faith and probable cause', available to a police officer under sec. 1983, there is no suggestion that a police officer is entitled to a defense of good faith when he makes an arrest without a warrant and without probable cause. (Footnote omitted)

> "We conclude that under 42 U.S.C. sec. 1983, where a police officer makes an arrest which is unlawful under the federal constitution because made without a warrant and without probable cause to believe that the person arrested had committed or was committing an offense, sec. 1983 imposes on the officer a liability which is recoverable in federal court. Additional circumstances coloring the officer's action as flagrant or malevolent are not required." Id.

This Court adopts the reasoning and conclusions of the Court in Joseph v. Rowlen, supra, and further notes that the United States Supreme Court has also expressly stated that:

> " . . .'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their personal houses, papers and effects,' only in the discretion of the police." Beck v. State of Ohio, 379 U.S. 89, 97 (1964).

Law enforcement is of paramount importance to the public at large, especially in this day and time, and it should be that is of equal importance that law enforcement observes and protects Constitutional rights as well as the prevention of crime and the apprehension of the criminal.

When a police officer performs his tasks

in a Constitutional manner the degree and quality of police work and of the enforcement of the laws of this nation are enhanced in every respect.

When those engaged in law enforcement work ignore and violate methods of performing their tasks as are permitted and sanctioned by the Constitution, they have not just trampled upon the Constitutional rights of an individual, but they have contributed to the breakdown of law and order. This breakdown is just as real, just as damaging when the police act in ignorance or blind adherence Constitutionally defective methods of operations as when they are motivated by malevolence or malice. A peaceful and orderly society in this nation must have strict compliance with all our laws -- that includes strict compliance with Constitutional standards and sanctions as well as the prompt and proper enforcement of the laws of the nation.

For these reasons the defense of "good faith attempts to comply with the law as they understood it" is rejected as a valid defense in a case such as this; a case in which probable cause has not been found. See also Whirl v. Kern, 407 F.2d 781 (5th Cir.1969). Liability has been shown, the extent of which will now be discussed.

IV. DAMAGES

In this action, Plaintiff has not claimed or submitted proof of actual damages of any specific amount. Absence of actual damages does not defeat an action under this section. Washington v. Official Court Stenographer, 251 F.Supp. 945 (D.C.E.Pa. 1966). In a claim for the violation of Constitutionally guaranteed rights damages are recoverable, nominal

damages may be presumed, Basista v. Weir, 340 F.2d 74 (3rd Cir.1965), and the award of exemplary or punitive damages is authorized in appropriate circumstances. Caperci v. Huntoon, 397 F.2d 799 (1st Cir.), cert. denied, 393 U.S. 940 (1968). Those circumstances have been limited to willful or malicious violations of Constitutional rights, circumstances which have been found not to be present here.

However, there is no doubt that Plaintiff suffered humiliation, embarrassment and discomfort in addition to being deprived of his federally protected rights as set forth above. Therefore, it is the judgment of this Court that Plaintiff recover the sum of $500.00 from Defendant Gibbs, the senior officer who was more directly connected with and responsible for Plaintiff's arrest and search of his car. Plaintiff's recovery against Defendant Stephens will be in the lesser amount of $250.00.

A Judgment will be entered accordingly.

The Clerk will furnish a copy hereof to all attorneys.

Entered this 5th day of May, 1970.

HALBERT O. WOODWARD
United States District Judge